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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

SUSAN GILNER,
Appellant,
v.
LINDA LICALSI, et al.,
Appellees

No. C-07-0960 MMC
(Case No. 05-31522 DM7
Adversary Proceeding No. 05-3374)
**DECISION AFFIRMING JUDGMENT OF
BANKRUPTCY COURT**

Before the Court is appellant Susan Gilner's ("Gilner") appeal from a judgment entered January 8, 2007 in the United States Bankruptcy Court. Having read and considered the briefs filed by the parties, the Court rules as follows.

BACKGROUND

In 2005, Gilner filed a petition for bankruptcy pursuant to Chapter 7 of the Bankruptcy Code. (Appellees' Addendum to Record on Appeal ("AR") 0022.) Thereafter, appellees Linda and Carla Licalsi ("the Licalsis") commenced an adversary proceeding against Gilner, and, on January 6, 2006, filed a "First Amended Complaint to Determine Dischargeability of Debt" ("FAC"). (AR 0001-12.)

In the FAC, the Licalsis allege that Gilner and the Licalsis, on March 12, 2002, executed a "Consignment Agreement" under which Gilner obtained the exclusive right to sell the Licalsis' "rare Bechstein Piano," conditioned upon the Licalsis' consenting to any

1 sale and, in return, Gilner would receive a commission for any approved sale, (AR 0002-
2 03); that after Gilner obtained possession of the piano, she entered into an agreement with
3 Tibor Szabo ("Szabo"),¹ a piano dealer, under which agreement he would act as an agent
4 for Gilner and would "market" the piano, (AR 0003); that Szabo, in September 2002, sold
5 the piano to a third party for approximately \$63,000, without the Licalsis consent or
6 knowledge (AR 0004); and that the Licalsis first learned of the sale in April 2003 and have
7 never been paid any proceeds from the sale, (AR 0004-05). Based on these allegations,
8 the Licalsis alleged a claim for embezzlement, as well as related claims. (AR 0001-12.)

9 On September 25, 2006, the Licalsis filed a motion for summary judgment, arguing
10 they were entitled to summary judgment on their claim against Gilner for embezzlement, as
11 well as on two other claims. (AR 0013-26.) On December 21, 2006, the Bankruptcy Court
12 conducted a hearing on the motion, (AR 0226-45), at which time the Bankruptcy Court
13 orally granted the motion as it pertained to the embezzlement claim (AR 0240). On
14 January 8, 2007, the Bankruptcy Court filed a written order granting the Licalsis' motion for
15 summary judgment on their embezzlement claim, (AR 0246-47); that same day, the
16 Bankruptcy Court filed a Judgment, entering judgment in favor of the Licalsis and against
17 Gilner on the embezzlement claim in the amount of \$51,400 and dismissing the Licalsis'
18 remaining claims against Gilner, (AR 0249-50). Gilner timely appealed.

19 LEGAL STANDARD

20 The Bankruptcy Court's grant of summary judgment is reviewed de novo. See
21 Focus Media, Inc. v. National Broadcasting Co. (In re Focus Media, 378 F. 3d 916, 922 (9th
22 Cir. 2004). "Summary judgment is appropriate if the record shows that there is no genuine
23 issue as to any material fact and that the moving party is entitled to judgment as a matter of
24 law." See id. (internal quotation and citation omitted).

25 DISCUSSION

26 As noted, the Bankruptcy Court granted summary judgment in favor of the Licalsis

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28 ¹The FAC refers to Szabo as "Tabo Szabo." The record indicates, however, that Szabo's first name is Tibor. (See AR 0044.)

1 on their embezzlement claim, finding there was no triable issue of material fact. (See AR
2 0230-31, 0238.) Gilner, who proceeded pro se in the Bankruptcy Court and proceeds pro
3 se on appeal, argues the Bankruptcy Court erred because, she asserts, triable issues of
4 material fact exist as to whether she committed embezzlement.²

5 To prove a claim of embezzlement, a plaintiff must establish the following elements:
6 “(1) property rightfully in the possession of a nonowner; (2) the nonowner’s appropriation of
7 the property to a use other than which it was entrusted; and (3) circumstances indicating
8 fraud.” See Littleton v. Transamerica Commercial Fin. Corp., 942 F. 2d 551, 555 (9th Cir.
9 1991) (internal quotation, alteration, and citation omitted).³ For the reasons stated below,
10 the Court finds the Licalsis established there was no triable issue of material fact as to any
11 of the elements of embezzlement, and, accordingly, the Bankruptcy Court did not err in
12 granting summary judgment in favor of the Licalsis.

13 **A. Property Rightfully In Possession Of Nonowner**

14 The first element is that a nonowner of property, such as Gilner, rightfully possessed
15 the property at issue. See id.

16 In the Bankruptcy Court, the Licalsis offered evidence that Gilner obtained
17 possession of the Licalsis’ piano rightfully, in light of the parties’ having entered into the
18 Consignment Agreement, under which Gilner would sell the piano for the Licalsis, (see AR
19 0029, 0034); Gilner offered no evidence to the contrary, and, indeed, conceded the piano
20 was “rightfully possessed by Gilner,” (see Pl.’s Mot. for Denial of Summ. J. at 4:15).⁴

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22 ²Gilner does not contend the Bankruptcy Court erred with respect to the amount of
damages the Bankruptcy Court found to be undisputed.

23 ³“Fraud,” in the context of a claim for embezzlement against a debtor, is “fraud in
24 fact, involving moral turpitude or intentional wrong, rather than implied or constructive
25 fraud.” See Teamsters Local 533 v. Schultz (In re Schultz), 46 B.R. 880, 889 (Bankr. D.
Nev. 1985).

26 ⁴Plaintiff’s “Motion for Denial of Summary Judgment,” filed in the Bankruptcy Court,
27 is attached as an exhibit to a document filed herein by Gilner and titled “Final Opportunity to
28 Show Cause Why Appeal Should Not Be Dismissed - and Copies of Filed Documents
Relevant to the Issue Presented.” Because plaintiff’s “Motion for Denial of Summary
Judgment” is verified, the factual statements therein were properly considered by the
Bankruptcy Court as evidence offered in opposition to the motion for summary judgment.

1 Accordingly, the Bankruptcy Court did not err in finding it was undisputed that the
2 piano was rightfully in the possession of Gilner.

3 **B. Nonowner's Misappropriation Of Property**

4 The second element is the nonowner's appropriation of the property to a use other
5 than that for which it was entrusted. See Littleton, 942 F. 2d at 555.

6 The Consignment Agreement unambiguously provides that the Licalsis entrusted the
7 piano to Gilner for the sole purpose of Gilner's selling the piano, that any sale by Gilner had
8 to be approved in advance by the Licalsis, and that Gilner was authorized to retain only a
9 portion of the sales proceeds as a commission. (See AR 0034.) The Licalsis presented
10 evidence that after Gilner executed the Consignment Agreement, Gilner entered into an
11 agreement with Szabo, under which Szabo agreed to show the piano at his showroom and
12 to "help" Gilner market the piano in return for his receiving monetary compensation from
13 Gilner, (see AR 0078, 0129); that Szabo sold the piano to a third party on September 25,
14 2002 for \$63,000, (see AR 0090, 0130); that the Licalsis never gave consent for such sale,
15 (see AR 0031, 0048); and that the Licalsis received no proceeds therefrom, (see AR 0031,
16 0048). In sum, the Licalsis offered evidence to support a finding that although the Licalsis'
17 entrusted Gilner to sell the piano only after the Licalsis consented to a sale and only if they
18 were paid the proceeds less the commission due, the piano was sold without the Licalsis'
19 consent and without any payment to the Licalsis.

20 Gilner points to no evidence in the record to dispute any of the above-referenced
21 evidence, and, consequently, said evidence is undisputed. Further, Gilner concedes that
22 Szabo acted as Gilner's "agent." (See Pl.'s Mot. for Denial of Summ. J. at 2:13-14.) Gilner
23 argues a triable issue of fact nonetheless exists.

24 First, Gilner relies on evidence that she advised Linda Licalsi that they "could
25 probably get more" if the piano were shown at Szabo's showroom, and that Linda Licalsi

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1 then agreed the piano could be shown at Szabo's showroom. (See Tunni Decl. ¶ 5.)⁵
2 Although not clearly expressed, Gilner appears to argue that, by consenting to allow Szabo
3 to show the piano, Linda Licalsi also consented to have Szabo sell the piano. Such
4 evidence is not sufficient to defeat summary judgment, however, as a finding that Linda
5 Licalsi agreed that an agent of Gilner could show the piano does not support a finding that
6 Linda Licalsi agreed that such agent was authorized to consummate a sale of the piano
7 without the Licalsis' consent and without making any payment to the Licalsis.

8 Second, Gilner relies on evidence that Szabo did not turn over all of the proceeds of
9 the sale to Gilner, (see Pl.'s Mot. for Denial of Summ. J. at 2:20-21), which, Gilner asserts,
10 supports a finding that "[t]he damage was done to the Licalsis solely by Tibor Szabo and
11 [his company]," (see id. at 3:16-17). Again, Gilner's reliance on the evidentiary record is
12 unavailing. As noted, Gilner concedes Szabo was acting as her agent. Moreover, it is
13 undisputed that Gilner was aware of Szabo's sale, either shortly before or shortly
14 thereafter, (see AR 0092-93; Pl.'s Mot. for Denial of Summ. J. at 2:16-17), that Gilner
15 never sought the Licalsis' consent to the sale or provided any of the proceeds to the
16 Licalsis, (see AR 0031, 0048), and that Gilner retained a portion of the proceeds as a
17 commission, (see AR 0169-70; Pl.'s Mot. for Denial of Summ. J. at 4:22-24.) Under such
18 circumstances, Gilner is liable, as a matter of law, for the actions of her agent Szabo. See
19 Tsurukawa v. Nikon Precision, Inc. (In re Tsurukawa), 358 B.R. 192, 196-98 (B.A.P. 9th
20 2001) (citing cases attributing "wrongdoing" of third party to debtor, where "agency
21 relationship" exists between third party and debtor); see also La Trattoria, Inc. v. Lansford
22 (In re Lansford), 822 F. 2d 902, 905 (9th Cir. 1987) (noting but not deciding issue of
23 whether imputation of agent's conduct to debtor requires "some culpability on the part of
24 the [debtor]").

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27 ⁵The Declaration of John Tunni, filed in the Bankruptcy Court, is attached as an
28 exhibit to plaintiff's "Final Opportunity to Show Cause Why Appeal Should Not Be
Dismissed - and Copies of Filed Documents Relevant to the Issue Presented."

1 Accordingly, the Bankruptcy Court did not err in finding it was undisputed Gilner
2 appropriated the piano for a use other than that for which it had been entrusted.

3 **C. Circumstances Indicating Fraud**

4 The third element is the presence of circumstances indicating fraud. See Littleton,
5 942 F. 2d at 555.

6 The Licalsis presented evidence that, after Szabo's sale of the piano, Gilner made
7 false statements to the Licalsis as to the status of the piano. Specifically, the Licalsis
8 offered evidence that, on April 28, 2003, approximately seven months after the piano had
9 been sold by Szabo with Gilner's knowledge, Linda Licalsi contacted Gilner by telephone to
10 inquire about the status of the piano, (see AR 0030), and that, during said conversation,
11 Gilner claimed, variously, to have "sent the [p]iano to Arizona for repairs," to have "received
12 a \$1,000 down payment from a potential buyer in California," and to have "sold the [p]iano
13 for about \$30,000," (see id.); at no time during the conversation did Gilner inform Licalsi
14 that Szabo had sold the piano in September 2002 for \$63,000, (see id.). Further,
15 according to Linda Licalsi, she telephoned Szabo later that day and learned the truth, or at
16 least some of the truth; Szabo, at that time, advised Linda Licalsi that he had sold the
17 piano in "the fall of 2002," although he gave her "several different sales prices." (See AR
18 0031).

19 Gilner points to no evidence to contradict any of the above evidence, and,
20 consequently, it is undisputed that Gilner, knowing the piano had been sold in September
21 2002 for \$63,000, knowing such sale had occurred without the Licalsis's consent, knowing
22 she had not provided any proceeds to the Licalsis, and knowing she had retained part of
23 the proceeds she believed to encompass her commission, falsely advised Linda Licalsi that
24 the piano had recently been sold for "about \$30,000." No reasonable trier of fact could find
25 such conduct was other than fraudulent.

26 Accordingly, the Bankruptcy Court did not err in finding it was undisputed that Gilner
27 engaged in fraudulent conduct.


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CONCLUSION

For the reasons stated, the judgment of the Bankruptcy Court is hereby AFFIRMED.
IT IS SO ORDERED.

Dated: February 27, 2008


MAXINE M. CHESNEY
United States District Judge